PEMILIK KAPAL "LUNA INDAH"

v.

ADMIRAL SHIPPING SDN BHD

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
TENGKU BAHARUDIN SHAH JCA
ZULKEFLI MAKINUDIN JCA
[CIVIL APPEAL NO: A-02-83-1997]
27 JUNE 2005

SHIPPING: *Action in rem - Arrest of vessel - Bail for release of vessel fixed at RM770,000 - Evidence that value of vessel only RM520,000 - Whether bail amount could be greater than value of vessel itself - Whether High Court judge misdirected himself in point of principle*

CIVIL PROCEDURE: *Admiralty - Security for release of ship - Bail for release of vessel fixed at RM770,000 - Evidence that value of vessel only RM520,000 – Whether bail amount could be greater than value of vessel itself - Whether High Court judge misdirected himself in point of principle*

CIVIL PROCEDURE: *Appeal - Competency of appeal - Appeal against order of High Court releasing and fixing bail for shipping vessel - Whether appeal directed against correct order - Whether appeal misconceived and improper*

The respondent, on 19 November 1996, issued a writ in rem and then applied for a warrant to arrest the appellant's vessel, the "Luna Indah", the subject matter of this appeal. The appellant, desiring its vessel released, applied to the judge-in-chambers for leave to provide bail upon which condition the vessel was to be released. Its application, marked as encl. 16 ('the bail summons') in the court file, came up for hearing before the High Court on 15 January 1997. After hearing arguments, the learned judge ordered the release of the vessel and fixed bail at RM770,000 although evidence had been placed before the learned judge that the value of the vessel itself was RM520,000. The learned judge then adjourned the appellant's summons to 31 January 1997 to hear arguments on the further orders that he was required to make on the bail summons. The appellant, being dissatisfied with the amount of bail fixed by the learned judge, appealed to this court. The respondent, also dissatisfied with the amount of the bail and complaining that it ought to be more than RM770,000, cross-appealed. The two issues requiring determination were: (i)

whether this appeal was competent in the sense that it was directed against the correct order; and (ii) whether the learned High Court judge was right in fixing bail at RM770,000. On the first issue, the respondent submitted that the appeal was misconceived because it was directed against the decision of the judge made on 31 January 1997 whereas the order complained of was in fact made on 15 January 1997.

Held (allowing the appeal and dismissing the cross-appeal):
Per Gopal Sri Ram JCA:

[1] The bail summons was not finally disposed of on 15 January 1997; all that had happened was that prayer 2 of that summons was dealt with and the bail summons itself was adjourned to 31 January 1997. When the matter came up again on 31 January 1997, the nature of the security formed the subject matter of argument and the learned judge made the appropriate orders at the conclusion of submissions. As the bail summons was not finally disposed of on 15 January 1997 and since what was being sought was a composite order, there was no merit in the respondent's argument that a separate notice of appeal was required to be directed against part of the order made on the summons on 15 January 1997. (pp 207 g-h & 208 a)

[1a] Both sides proceeded on the common assumption that the order under challenge was made on 31 January 1997 because even the respondent's notice of cross-appeal complaining about the amount of bail being inadequate sought a variation of the order given at the Ipoh High Court on 31 January 1997. It therefore hardly laid in the mouth of the respondent to say that the appeal was out of order. Indeed, it would be wholly unjust and inequitable from a procedural point of view to accede to the submissions made by the respondent on this point. Hence, the appeal was properly before this court. (p 208 b)

[2] As a matter of principle, the owner or charterer or person interested in the vessel under arrest and who seeks its release on bail cannot be ordered to provide security which in amount is greater than the value of the vessel itself. In the present instance, there was no challenge evidentially to the fact that the value of the "Luna Indah" was RM520,000. It appeared that the learned judge seemed to have misdirected himself in point of principle by fixing the bail bond at RM770,000. This was one of those cases that fell within the class of cases in which appellate intervention was warranted. Based on established principles, this court had no doubt but to disagree with the learned judge. (pp 208 g & 209 a-d)

[2a] For the reasons already given, this appeal succeeded. The order of the learned judge dated 31 January 1997 fixing bail at RM770,000 was set aside and the bail bond provided by the appellant was hereby cancelled. In its place, the appellant shall, within 14 days from this date ie, not later than 4pm on 11 July 2005, lodge with the registrar of the High Court a bond to the sum of RM520,000 in accordance with O. 70 Rules of the High Court 1980. Following this, the cross-appeal could not succeed and was accordingly dismissed. (p 209 e-f)

[Order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Pada 19 November 1996, responden telah mengeluarkan writ *in rem* dan kemudin memohon waran untuk menahan kapal perayu "Luna Indah", yang menjadi pertikaian rayuan semasa. Perayu berhasrat untuk membebaskan kapalnya dan dengan itu memohon kepada hakim dalam kamar untuk kebenaran membayar jaminan bagi pembebasan tersebut. Permohonan perayu, ditanda sebagai lampiran 16 (saman jaminan) di fail mahkamah di bawah, telah di angkat untuk pendengaran ke Mahkamah Tinggi pada 15 Januari 1997. Selepas mendengar hujah, yang arif hakim telah memerintahkan pembebasan kapal dan menetapkan jaminan pada kadar RM770,000, walaupun keterangan dikemukakan bahawa nilai kapal tersebut hanyalah RM520,000. Yang arif hakim kemudian menangguhkan saman perayu ke 31 Januari 1997 bagi mendengar hujah bagi perintah-perintah lanjutan yang perlu dibuat oleh beliau dalam saman jaminan. Perayu, yang tidak berpuas hati dengan jumlah jaminan yang ditetapkan oleh yang arif hakim, merayu ke mahkamah ini. Responden, yang juga tidak berpuas hati dengan jumlah jaminan dan bersungut bahawa jumlah sepatutnya lebih tinggi dari RM770,000, merayu balas. Dua isu yang perlu ditangani adalah: (i) sama ada rayuan di sini berkompeten dalam ertikata ianya dihadapkan kepada perintah yang betul; dan (ii) sama ada yang arif hakim Mahkamah Tinggi betul dalam menetapkan jaminan sebanyak RM770,000. Berhubung isu pertama, responden berhujah bahawa rayuan telah tersalah bawa kerana ia dihadapkan kepada keputusan hakim bertarikh 31 Januari 1997, sedangkan perintah yang dibantahi dibuat pada 15 Januari 1997.

Diputuskan (membenarkan rayuan dan menolak rayuan balas) Oleh Gopal Sri Ram HMR:

[1] Saman jaminan tidak diputuskan sepenuhnya pada 15 Januari 1997; apa yang berlaku hanyalah bahawa permohonan kedua saman tersebut telah ditangani dan saman jaminan itu sendiri telah ditangguhkan ke 31 Januari 1997. Apabila perkara tersebut diangkat kembali pada 31 Januari 1997, sifat jaminan menjadi pokok pertikaian dan yang arif hakim membuat perintah-perintah yang bersesuaian di akhir penghujahan. Oleh kerana saman jaminan tidak diputuskan sepenuhnya pada 15 Januari 1997, dan oleh kerana apa yang dipohon adalah suatu perintah komposit, maka tidak ada merit dalam hujah responden bahawa satu notis rayuan berasingan adalah diperlukan untuk bahagian perintah yang dibuat pada saman pada 15 Januari 1997.

[1a] Kedua-dua pihak meneruskan atas andaian bersama bahawa perintah yang dicabar adalah dibuat pada 31 Januari 1997, lebih-lebih lagi notis rayuan balas responden sendiri, yang merungut kerana jumlah jaminan dikatakan tidak mencukupi, juga memohon pindaan terhadap perintah yang dibuat di Mahkamah Tinggi Ipoh pada 31 Januari 1997. Oleh itu tidaklah wajar bagi responden untuk mengatakan bahawa rayuan adalah tersalah sasar. Malah, amatlah tidak adil dari segi persoalan prosedur untuk akur pada tuntutan responden yang berkenaan. Rayuan ke mahkamah ini, dengan itu, adalah teratur.

[2] Sebagai suatu perkara prinsip, seorang pemilik atau penyewa kapal atau orang-orang yang mempunyai kepentingan di dalam kapal yang sedang ditahan dan memohon untuk membebaskannya atas jaminan tidak boleh diperintah untuk mengemukakan jaminan yang jumlahnya lebih tinggi dari nilai kapal itu sendiri. Dalam kes semasa, tidak ada cabaran pada keterangan bahawa nilai "Luna Indah" adalah RM520,000. Yang arif hakim kelihatnnya telah tersalah arah akan dirinya dari segi prinsip apabila menetapkan jaminan pada kadar RM770,000. Kes ini, dengan itu, termasuk dalam ketegori kes-kes di mana campur tangan peringkat rayuan adalah wajar. Berdasarkan kepada prinsip yang terpakai lama, mahkamah ini tidak boleh bersetuju dengan yang arif hakim.

[2a] Rayuan di sini harus berjaya atas alasan-alasan yang diberi. Perintah yang arif hakim bertarikh 31 Januari 1997 yang menetapkan jamin sebanyak RM770,000 diketepikan dan bon jamin yang diberi oleh perayu adalah dibatalkan. Sebagai ganti, perayu hendaklah, dalam masa 14 hari dari tarikh ini, iaitu tidak lebih dari 4 petang 11 Julai 2005, mengemukakan kepada pendaftar Mahkamah Tinggi suatu bon bernilai RM520,000 selaras dengan A. 70 Kaedah-Kaedah Mahkamah Tinggi 1980. Ianya mengikut bahawa rayuan balas tidak berjaya dan harus ditolak.

[Perintah sekadarnya.]

Case(s) referred to:
Concord Line Co Ltd v. The Owners of the Ship "Molly" [1997] 4 CLJ Supp 285 HC ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 70

Other source(s) referred to:
DC Jackson, *Enforcement of Maritime Claims*, Lloyd's of London Press Ltd, 1985, p 183

For the appellant - Bharti Seth (Philip Teoh Oon Teong with her); M/s Philip Teoh & Co
For the respondent - Arun Krishnalingam (Mathew Kurien with him); M/s Sativale Mathew Arun

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:
This is the judgment of the court.

On 19 November 1996, the respondent ("plaintiff in the court below") issued the writ in rem and then applied for a warrant to arrest the appellant's vessel, the subject matter of this appeal. The vessel is named the "Luna Indah".

The facts that form the matrix upon which the action is based are fairly short and undisputed. The "Emerald Venture" was carrying a cargo of 10,600 cbm logs for transhipment. When it arrived in Lumut, it ran into problems. It got arrested. It also had developed a fault in its hull which required repairs. So the logs in question were transferred to the "Luna Indah". Later, all the logs save 122 were reloaded onto the "Emerald Venture". For completeness we

would add that the respondent was at the material time charterers of the "Emerald Venture" and had rights and title to the logs in question. The owners of the "Luna Indah", the appellant before us, refused to deliver up to the respondents the 122 logs in question. That is what led to the issue of the writ and the arrest which we spoke of a moment ago.

The appellant wanted their vessel released so they applied to the judge in chambers for leave to provide bail upon which condition the vessel was to be released. Their application, marked as encl. 16 (the bail summons) in the court file, came up for hearing before the High Court on 15 January 1997. After hearing arguments, the learned judge ordered the release of the vessel "Luna Indah" and fixed bail at RM770,000. Evidence had been placed before the learned judge that the value of the vessel itself was RM520,000.

The learned judge then adjourned the appellant's summons to 31 January 1997 to hear arguments on the further orders which he was required to make on the bail summons. He made those orders when the matters came before him. We do not propose to say anything about that as it is not the subject matter of complaint before us.

The appellant being dissatisfied with the amount of bail fixed by the learned judge has appealed to this court. The respondent, also dissatisfied with the amount of the bail and complaining that it ought to be more than RM770,000 has cross-appealed.

In the argument addressed to us this morning two issues have emerged for our decision. The first is, whether this appeal is competent in the sense that it is directed against the correct order. The second is whether the learned High Court judge was right in fixing the bail at RM770,000. We will address each of these issues in turn.

On the first issue, it is the submission of the learned counsel for the respondent that the appeal is misconceived because it is directed against the decision of the judge made on 31 January 1997 whereas the order complained of was in fact made on 15 January 1997. We have had our attention drawn to the notes of proceedings before the learned judge and we noticed that the bail summons was not finally disposed of on 15 January 1997. All that happened was prayer 2 of that summons was dealt with and the bail summons itself was adjourned to 31 January 1997. When the matter came up again on 31 January 1997 the nature of the security formed the subject matter of argument and at the conclusion of submission the learned judge made the appropriate orders. As we said earlier, the bail summons was not finally disposed of on 15 January 1997 and since what was being sought was a composite order, we find no

merit in the respondent's argument that a separate notice of appeal is required to be directed against part of the order made on the summons on 15 January 1997.

We think both sides proceeded on the common assumption that the order under challenge was made on 31 January 1997. We say this because even the respondent's notice of cross appeal which complained about the amount of bail being inadequate seeks a variation of the order given at the High Court Ipoh on 31 January 1997. It therefore hardly lies in the mouth of the respondent to now say that the appeal is out of order. Indeed it would be in our judgment wholly unjust and inequitable from a procedural point of view to accede to the submissions made to us this morning on this point. We are therefore of the view that the appeal is properly before us.

That brings us to the second issue. The principles governing the fixing of bail for the release of a vessel under arrest are not in doubt. They are conveniently summarized in the leading text on the subject *"Enforcement of Maritime Claims"* by D.C. Jackson, Lloyd's of London Press Ltd, 1985, wherein at p. 183 the learned author had this to say:

> Bail is the substitution of personal for real security. It may be given by a defendant who has acknowledged the issue or service of a writ *in rem*. In English law bail is given to the court through a bail bond and sureties to the bond. Today it is not much used compared with a guarantee. It takes the place of the ship or other property and may be given initially to prevent arrest of the ship or in order to obtain its release. The security provided cannot exceed the value of the ship but, subject to that limit, a party is entitled to 'sufficient security to cover the amount of his claim with interest and costs on the basis of his reasonably best argued case.' It is restricted in its availability and its effect on any claim on the ship to the claim in respect of which it is lodged and therefore represents the ship only in regard to that claimant. It is initially for the claimant to agree to accept an undertaking to give bail as sufficient security and eventually to agree to an acceptable amount. The party seeking security must not abuse his undoubted position of strength and the demanding of excessive bail may lead to a liability for costs. It is for the court to be satisfied as to sufficiency and acceptability of the surety.

It is clear from the foregoing passage that, as a matter of principle, the owner or charterer or persons interested in the vessel under arrest and who seeks its release on bail cannot be ordered to provide security which in amount is greater than the value of the vessel itself.

In *Concord Line Co. Ltd v. The Owners of the Ship "Molly"* [1997] 4 CLJ Supp 285, Abdul Malik bin Ishak J in a careful and well researched judgment on this subject at p. 315 said:

> Bail in admiralty proceedings is always identified with the ship. The bail bond is limited to the amount of the ship if the ship is worth far less than the sum of the bond. Even an undertaking to give bail continues to bind if on reliance on it a ship leaves the jurisdiction. It is the practice crystallised through a long line of authorities that the security cannot exceed the value of the ship. *William Henry Smith v. Bank of New South Wales, The "Staffordshire"* [1872] and *The "Charlotte"* [1920] P 28 are some of the cases that propel themselves to the fore"

In the present instance there is no challenge evidentially to the fact that the "Luna Indah's" value is RM520,000. It appears with great respect to the learned judge that he seems to have misdirected himself in point of principle by fixing the bail bond at RM770,000. This then is one of those cases which falls within the class of cases in which appellate intervention is warranted. Based on established principles, we have no doubt but to disagree with the learned judge.

For the reasons already given, this appeal succeeds. The order of the learned judge dated 31 January 1997 fixing bail at RM770,000 is set aside. The bail bond provided by the appellant is hereby cancelled. In its place, the appellant shall within 14 days from today, that is to say, not later than 4pm on 11 July 2005 lodge with the registrar of the High Court, a bond to the sum of RM520,000 in accordance with O. 70 Rules of the High Court 1980. It follows from what we have said thus far, that the cross appeal cannot succeed. It is dismissed. The respondent must pay the costs of the appeal, the cross appeal and all costs incurred in the court below. The deposits are refunded to the appellant.